

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JOHN JULIAN,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

COMMONWEALTH ENERGY  
CORPORATION,

Real Party In Interest.

G030141

(Super. Ct. No. 00CC06778)

OPINION

Original proceedings; petition for a writ of mandate to challenge an order of the Superior Court of Orange County, David R. Chaffee, Judge. Petition granted.

Douglas A. Ames for Petitioner.

Vance, Blair & Grady and Howard L. Grady for Real Party in Interest.

\* \* \*

THE COURT: \*

Without holding a hearing, the trial court, on ex parte application, recalled and quashed a writ of execution, and ordered return of funds levied on and held by the sheriff. This was clear error. Just as courts must conduct oral hearings on critical *pretrial* matters (see *Mediterranean Construction Co. v. State Farm Fire & Casualty Co.* (1998) 66 Cal.App.4th 257, 266-267, fn. 11 [summary judgment]; *Hobbs v. Weiss* (1999) 73 Cal.App.4th 76, 77 [writ of attachment]), they must also conduct oral hearings on critical *posttrial* matters.

## I

The key facts are undisputed. John Julian filed a complaint against Commonwealth Energy Corporation for breach of contract. He alleged it failed to issue him 338,000 stock options he had earned. A jury agreed, and judgment was entered in his favor. He was also awarded \$1 in nominal damages. Commonwealth filed a notice of appeal as to the judgment. Later, on motion, the trial court awarded Julian almost \$27,000 in attorney fees and costs.

When Commonwealth did not post an undertaking as required by Code of Civil Procedure section 917.1, subdivision (a)(1) [perfecting an appeal does not stay enforcement of a money judgment “[u]nless an undertaking is given”], Julian had a writ of execution issued. After the sheriff executed on the company’s bank account, Commonwealth filed an ex parte application to quash the writ claiming it had paid the damages part of the judgment (i.e., \$1 in nominal damages), and because only the costs portion of the judgment remained, pursuant to Code of Civil Procedure section 917.1, subdivision (d), no undertaking was required [“no undertaking shall be required pursuant to this section solely for costs awarded”]. Accompanying service of the ex parte application was a letter from Commonwealth’s counsel reminding Julian’s attorney: “As you will

---

\* Before Sills, P. J., Rylaarsdam, J., and O’Leary, J.

recall Judge Chaffee does not permit oral argument on ex parte matters so no appearance will be made.”

The court, without holding a hearing, recalled and quashed the writ of execution and ordered the sheriff to return the levied funds. Julian then filed this petition for writ of mandate. He contended, among other things, that even if a motion to quash a writ of execution could be heard ex parte, Commonwealth’s application for ex parte relief did not even comply with the procedural requirements of California Rules of Court, rule 379, and in any event, the court was required to hold a hearing before it could grant the motion.

We invited Commonwealth to reply, and indicated the court was considering issuing a peremptory writ in the first instance. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.) Apparently recognizing the trial court’s failure to require a noticed motion or conduct a hearing was indefensible, Commonwealth filed a very short letter brief arguing only that the petition should be denied because the court would have quashed the writ even if there had been a hearing. Essentially, it argues: no harm, no foul. While that aphorism has obtained a common currency, it cannot be used to subsequently validate court action that was unauthorized and deprived a party of basic due process.

## II

The court could not entertain the motion ex parte. Ex parte relief is not available when the matter requires a noticed motion or may affect the rights of an adverse party. (See *Carabini v. Superior Court* (1994) 26 Cal.App.4th 239, 243.) A request to recall and quash a writ of execution must be made by noticed motion. (See 8 Witkin, Cal. Procedure (4th ed. 1997) Enforcement of Judgment, § 154, pp. 176-177.) Thus, the court should have told Commonwealth to file a noticed motion. Even if a motion to quash could be made ex parte, a hearing would still have been required. California Rules of Court, rule 379(g) limits the court’s power to rule without an oral hearing to very minor matters, such as “applications to file points and authorities in excess of the applicable page limit.” A motion to recall and quash a writ of execution is clearly not a minor matter under any

reasonable interpretation of this rule. Thus, the court's order must be reversed, and the court ordered to hold a hearing on the motion

For the benefit of the court and parties, when the court hears the matter, we would note that Commonwealth's reliance on *Ziello v. Superior Court* (1999) 75 Cal.App.4th 651 appears misplaced. In that case, the appellant filed a notice of appeal solely as to the award of costs, and under those limited circumstances the appellate court concluded an undertaking was not required. (*Id.* at p. 655; see Code Civ. Proc., § 917.1, subd. (d).) In this case, on the other hand, a notice of appeal was filed as to the entire judgment. Of course, whether that distinction requires a different result must be determined by the trial court in the first instance. In addition, we would remind the trial court that even if it determines an undertaking is not required by statute, it may, in its discretion, require one under Code of Civil Procedure section 917.9, subdivision (a)(3) [court may require undertaking when judgment solely for costs]. (See *Ziello v. Superior Court*, *supra*, 75 Cal.App.4th at p. 655, fn. 2.)

Let a writ of mandate issue commanding the trial court to vacate its order recalling and quashing the writ of execution, and to conduct an oral hearing on the motion in a timely fashion which permits petitioner a fair and reasonable opportunity to oppose the motion. For the benefit of the court and parties, we emphasize the limited scope of our ruling today: We express no views on the merits of the motion; we are simply requiring the court to hold a hearing on the matter. Petitioner is awarded costs in this proceeding. (Cal. Rules of Court, rule 56.4(a).) In the interests of justice, the remittitur shall issue forthwith. (Cal. Rules of Court, rule 24(d)(2).)